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## The Qur'an and the Common Law: Islamic Law Reform and the Theory of Legal Change

*Editor's Note: In Part One of this article, published in the last issue, Professor Horowitz noted the rapid legal change taking place in many parts of the world. Widespread Islamic law reform forms a prominent part of the process of change. Professor Horowitz pointed out that there is an inadequate supply of good theory to explain the sources and the directions of legal change, particularly theory that is genuinely comparative, and he then provided a critical survey of the main theoretical approaches that might be brought to bear on the problem of change. Thereafter, Professor Horowitz laid out the contours of the extensive statutory changes that have taken place in Malaysian Islamic law, explaining that the Malaysian drafters had borrowed freely, both from other Islamic systems and from British-derived secular law, which has strong roots in Malaysia.*

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*In Part Two, Professor Horowitz shows the powerful influence of common law methods on legal reasoning, on the reshaping of old Islamic law doctrines and the creation of wholly new obligations, and on the legal process in general. He then reevaluates the predominant approaches to legal change and makes the case for legal acculturation—a syncretic process by which the norms of one system infuse those of another, without necessarily undermining the latter's authenticity.*

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## PART TWO

### IV. JUDICIAL DOCTRINE: A COMMON LAW OF SHARIAH

Proponents of Islamic reform in Malaysia have not been content to move the law along by means of legislative enactment alone: case law has also been a vehicle. Here the most visible evidence is heavily in the appeal boards and committees of jurisdictions following the Federal Territory model, two of them in particular. The decisions of these appellate bodies are replete with secular methods of statutory interpretation, applied even to sacred sources, with common law incrementalism, with holdings in the alternative, with distinctions among prior cases and disavowals of earlier dicta, and with avoidance of ultimate questions. The decisions often articulate new standards, occasionally clashing with those of other jurisdictions. Like the statutes, the Islamic case law evidences convergence with the secular law.

#### A. *Divorce and Polygamy: New Standards and Conflicts*

Consider first a talak case decided by the Selangor Appeal Committee in 1991. As we have seen in Part One,<sup>328</sup> the statute prohibits (indeed, it penalizes<sup>329</sup>) utterance of a talak out of court. Traditional Shafi'i doctrine, however, finds extrajudicial talak to be completely normal and effective for divorce.<sup>330</sup> In this case, *Zainab binti Mahmood and Abd. Latif bin Jusoh*,<sup>331</sup> there were no witnesses to the extrajudicial talak, except the wife, who denied it had been uttered. Under customary Shafi'i doctrine, neither witnesses nor the wife's presence would be required. Consequently, the kadi held the repudiation to be effective. The appeal committee reversed, holding that the statute provides the exclusive way to register a talak divorce when the wife does not agree.<sup>332</sup> That is, application must be made to the court, and the conciliation process must be followed. Moreover, said the Selangor Committee, the Qur'an requires that a talak be witnessed by two adults of good character, failing which it is invalid.<sup>333</sup> The witnessing, the committee implied, must be done in the kadi's court. Talak remains the husband's right in Islam, but it may not be

328. Supra at 274.

329. Selangor Islamic Family Law Enactment 1984, No. 4 of 1984, § 124.

330. Nawawi, supra n. 193, at 327-44.

331. Civil Appeal Case No. 16 of 1990 (Selangor App. Comm. 1991).

332. Id., slip op. at 4.

333. Id. at 6-7.

uttered arbitrarily. Accordingly, concluded the committee, there is no conflict between the statutory provision and the Qur'anic ones.<sup>334</sup>

Of course, it may be asked how talak can be the husband's right if the statutory ground in which the right is now subsumed requires a judicial finding of irretrievable breakdown.<sup>335</sup> And if talak may not be uttered at the pleasure of the husband, why do the Shafi'i sources recite innumerable ways to utter a repudiation, including: "Go back to your family," "Go away," "Leave me alone," "Bid me good-bye," and the singularly expressive "Your rope is on your withers"?<sup>336</sup> To be sure, the statute is clear enough in failing to countenance extrajudicial repudiation or, for that matter, repudiation even in court without a finding of breakdown. But that merely makes the statute more problematic in Islamic terms, and it cannot be doubted that a good many kadis were—and are—registering divorces based on talaks uttered long before the parties got to court. The *Zainab* decision was not popular among *ulama*. There is a clear doctrinal trend here, but it is not uncontested.

If *Zainab* was unpopular, *Aishah bte. Abdul Rauf v. Wan Mohd. Yusof bin Wan Othman*,<sup>337</sup> decided by the same appeal committee a year earlier, produced a storm of protest in the Malay press.<sup>338</sup> Wan Yusof was a well-off businessman who applied for permission to take as his second wife a Malay film star, Noor Kumalasari. Aishah, his first wife, refused to concur and contested his application in the kadi's court outside Kuala Lumpur. Noting Wan Yusof's financial ability and finding him able to satisfy the emotional needs of both women, the kadi granted permission. Aishah appealed, and the committee reversed.

On the question of financial ability, the appeal committee accepted the kadi's finding but cautioned ominously that in future applicants for polygamous marriages will need to provide documentary evidence, including income tax records.<sup>339</sup> The committee then went on to hold that Wan Yusof had failed to prove that the second mar-

334. Id. at 9.

335. Selangor Islamic Family Law Enactment 1984, No. 4 of 1984, §§ 47-48.

336. Nawawi, *supra* n. 193, at 327-44.

337. [1990] 3 M.L.J. lx (Selangor App. Comm. 1990).

338. For small portions of the debate, see A. Nazri Abdullah, "Undang-undang Kekeluargaan Islam: Siapa yang Keliru? [Islamic Family Law: Who is Confused?]," *Berita Minggu*, Aug. 5, 1990, at 10; Khalid Mohd., "Sejauh manakah undang2 boleh halang poligami [How Far Can the Laws Change Polygamy?]," *Mingguan Malaysia*, Aug. 5, 1990, at 9; "Polygamy not a right enshrined in the Quran," *New Straits Times*, Aug. 20, 1990, at F-17. See also "Noorkumalasari Appeals to Trader's Wife," *Star*, Aug. 4, 1990, at 3.

339. [1990] 3 M.L.J. at lxii. The reliance on documents for such purposes is not customary in Islamic law. See generally J.A. Wakin, *The Function of Documents in Islamic Law* (1972); Messick, "The Mufti, the Text and the World: Legal Interpretation in Yemen," 21 *Man* (n.s.) 102, 114 (1986).

riage was "just and necessary," as the statute requires.<sup>340</sup> His stated inability to control his love for Noor Kumalasari would not make a second marriage just. And, added the committee, the bare statement by a husband that he intends to treat his first wife and existing children fairly does not make it so. At the very least, witnesses must testify that the husband is a God-fearing and observant Muslim.<sup>341</sup>

The committee turned finally, but briefly, to the religious validity of the four polygamy conditions of the Selangor statute, which, as we have just seen, go beyond conventional Shafi'i doctrine. The committee held that they are not in conflict with the Qur'an. The Qur'an appears to permit up to four wives unless the husband fears that he will "not be able to deal justly with them . . ."<sup>342</sup> The statute does not aim "to abolish polygamy," said the committee, "but it merely provides constructive requirements in the hope that justice in the Muslim family may be better achieved."<sup>343</sup>

Perhaps so, but, with an open-ended burden of proof about future conduct placed on the husband, it is difficult to imagine that many applications for polygamous marriages will be approved if the first wife objects. It is said that the Sultan of Selangor was concerned about the legality of his own polygamous marriage after this decision, and the four remaining conditions came under serious scrutiny.<sup>344</sup>

None of this was of more than passing concern to Wan Yusof. He and Noor Kumalasari traveled to the east coast state of Trengganu, there to be married by a kadi who did not inquire or did not care what the Selangor Appeal Committee had done.<sup>345</sup>

At the time of the marriage in Trengganu, that state's Family Law Enactment simply required, in general terms, the permission of a Shariah court judge for a polygamous marriage.<sup>346</sup> The Selangor standards, however, purport to apply to prospective polygamous husbands who are resident in Selangor, even if they are to be married outside Selangor.<sup>347</sup> The Trengganu act provides that marriages are generally to be solemnized in the *mukim* or area in which the bride resides, unless the kadi or Registrar of Marriages allows solemniza-

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340. Selangor Islamic Family Law Enactment 1984, No. 4 of 1984, § 23(3).

341. [1990] 3 M.L.J. at lxiii.

342. Sura An-Nissa', quoted in *id.*

343. *Id.*

344. I am drawing here on an interview with a prominent Islamic jurist, Kuala Lumpur, Apr. 27, 1992. The appeal committee was called in by the Sultan and asked to explain the decision; and the state mufti was asked to examine the legality of the four statutory conditions for polygamy. *Id.*

345. It is not uncommon for husbands refused permission to take a second wife to leave the jurisdiction and marry her in another state or in southern Thailand. Raja Rohana, *supra* n. 161, at 65.

346. Terengganu Administration of Islamic Family Law Enactment 1985, No. 12 of 1985, § 21.

347. Selangor Islamic Family Law Enactment 1984, No. 4 of 1984, § 23(2).

tion to take place elsewhere.<sup>348</sup> If the woman resides in another state, the appropriate authority in the other state must first give permission for the marriage,<sup>349</sup> which manifestly Selangor did not do in Noor Kumalasari's case. Under Trengganu law, in short, if the bride had established Trengganu residence, all that would be required for the polygamous marriage would be the permission of the Trengganu kadi. If she had not, the Selangor authorities would have had to be consulted.

That is the law of Trengganu. But what about the law of Selangor? What effect does the Selangor provision giving extraterritorial application to its polygamy requirements have, when Selangor residents seek to be married outside the state? Suppose Aishah, the first wife, had managed to object to the Trengganu marriage on the basis of the refusal of permission in Selangor. Would the Trengganu kadi have been legally obliged to recognize the Selangor refusal? If Noor Kumalasari were not a Trengganu resident, as we have seen, the second marriage would clearly be foreclosed under the Trengganu statute. But if Noor Kumalasari were a Trengganu resident, the answer is much less clear. The conventional answer in Islamic law is that each kadi must decide for himself, and so the Trengganu kadi may not have been obliged to recognize Selangor's refusal of permission, based on Selangor's more restrictive standards for polygamy.

Why this is so may seem a bit mysterious. It may reflect a confusion of the absence of an Islamic doctrine of precedent with the absence of a doctrine of recognition of judgments. Malaysia's Islamic system is superimposed on its federal system, and there is no doubt that one kadi will recognize the marital status of a party married or divorced in another jurisdiction. So, if no proceedings had taken place in Selangor and Wan Yusof had been married to a second wife in Trengganu on a showing insufficient to justify polygamy in Selangor, Selangor courts would still recognize the marriage. Even now, they would presumably do so, though they refused permission before the marriage, when the issue was open to them.<sup>350</sup> The usual conflict-of-laws principle is that a marriage valid where contracted will be recognized elsewhere unless it is contrary to the fundamental pub-

348. Terengganu Administration of Islamic Family Law Enactment 1985, No. 12 of 1985, § 18.

349. *Id.*, § 18(3)(b). If the husband-to-be is resident in a state other than Terengganu, the appropriate authority in that state would merely have to attest to the truth of the facts stated in the marriage application. *Id.*

350. Indeed, the marriage can now be registered in Selangor. See Selangor Islamic Family Law Enactment 1984, No. 4 of 1984 (as amended by Selangor Islamic Family Law (Amendment) Enactment 1988, No. 6 of 1988, § 5), § 23(1): "No man, during the subsistence of a marriage shall, except with the prior permission in writing of the Syar'iah Judge, contract another marriage, but and subject to Section 123 if he marries without such permission such marriage may be registered under this Enactment on the order of the Court." Section 123 is the provision making polygamy without permission an offense.

lic policy of the state in which recognition is sought.<sup>351</sup> But the same principle does not require recognition of one state's *refusal* to permit marriage, based on standards more restrictive than those that prevail in the second state.<sup>352</sup> Selangor's attempt to restrict the behavior of its residents outside its borders will likely be ineffective if the parties meet the requirements laid down by another state, as Wan Yusof and Noor Kumalasari apparently did.

The potential for confusion and interstate conflict exemplified by *Aishah v. Wan Yusof* suggests the urgent need to develop principles of Islamic conflict of laws that thus far do not exist. A draft bill on interstate enforcement of summonses, warrants, judgments, and orders of Shariah courts has been prepared for enactment.<sup>353</sup> It provides that a Shariah court order or judgment from one state may be registered in the Shariah court of another; from that point on it will be treated as if it had been issued by the receiving court.<sup>354</sup> By far the most important problem to which such provisions are directed relates to the recurrent failure of husbands and former husbands to comply with maintenance orders. On such problems, the act should have a beneficial impact. But where two states follow different standards in their Shariah law, the underlying conflict-of-laws problems will not necessarily be resolved by interstate registration of judgments and orders alone. In cases like *Aishah*, the more permissive state may not be bound by a decision of a more restrictive state if the kadi finds the restrictive standards to be in excess of what Hukum Syara requires. For the most part, the reaction of reformers has been to decry the variation rather than search for principles of recognition and non-recognition of judgments in the light of Islamic rules about the prerogative of kadis.

Occasionally, informal means are found to prevent interjurisdictional circumvention of judgments. In one Singapore case, a wife ignored a judicial decree of reconciliation obtained by her husband and proceeded across the causeway to Johore to be married to a second man, only to find the Singapore kadi close behind. On proof of the

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351. See, e.g., *In re May's Estate*, 305 N.Y. 486, 114 N.E.2d 4 (1953).

352. Thus, restrictions on marriage to first cousins, very common in states of the United States, do not bind those states that permit such marriages. And marriages between first cousins in the less restrictive states will be recognized as valid in the couple's home state even if they went to the less restrictive state solely to take advantage of its more liberal marriage law and returned home immediately thereafter. *Schofield v. Schofield*, 51 Pa. Super. 564 (1912). But compare *id.*, at 570 (an expressed personal incapacity imposed by legislation will be respected regardless of where marriage is contracted) (dictum) with *Loughran v. Loughran*, 292 U.S. 216 (1933). See Russell J. Weintraub, *Commentary on the Conflict of Laws* § 5.1A (3d ed. 1986).

353. Sabah Syariah Courts (Enforcement of Summonses, Warrants, Judgements and Orders) Bill 1992, Legislative Assembly Bill No. O of 1992. Although the Sabah version is cited, this unenacted bill is likely to be enacted by the federal parliament rather than a state legislature.

354. *Id.*, § 4(1).

reconciliation, the Johore kadi annulled the second marriage he had performed.<sup>355</sup> Such piecemeal methods do not satisfy the conflict-of-law impulses of Malaysia's Islamic law reformers, who itch for a means of securing uniform laws and uniform application of them. Denial of permission for polygamy has not been uncommon in Selangor; it appears to be quite uncommon in Trengganu. As things now stand, alternative models in family law allow forum shopping.

A vexing problem under Shafi'i doctrine that is slowly being resolved by judicial decision is the matter of *talak tiga* (three talaks). Only a talak thrice uttered is irrevocable; indeed, it terminates maintenance payments to the divorced wife and precludes remarriage to her unless another consummated marriage intervenes. But what if a husband utters three talaks at once? Nearly all the Arab countries and most other Islamic jurisdictions provide that a simultaneous triple talak counts only as one and so is revocable.<sup>356</sup> The Shafi'i school, however, counts it as three,<sup>357</sup> much to the chagrin of Islamic reformers among the Shafi'i Malays.

Slowly, judicial decisions seem to be eroding the firmness of this rule. Where the husband was found to belong to the Hanafi school, presumably because he was an Indian Muslim, three talaks were held to equal one.<sup>358</sup> Where a husband had previously uttered one talak and then simultaneously uttered two more, the Federal Territory Appeal Board reversed a kadi's determination of irrevocable divorce and found as a matter of fact that the husband had only meant to utter the second talak.<sup>359</sup> Where the husband could not recall the date of the alleged talak tiga, and the wife denied he had uttered it, the same appeal board, expressing obvious displeasure with the ease with which the kadi had confirmed the irrevocable divorce, remanded the case for a hearing.<sup>360</sup> The wife's denial puts the burden of proof

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355. Djamour, *supra* n. 126, at 127-28.

356. Anderson, *supra* n. 209, at 227; Siraj, *supra* n. 276, at 229.

357. Ahmad Ibrahim, *supra* n. 248, at xv (overview of talak tiga issue in Shafi'i thought).

358. Re Mohd. Hussin bin Abdul Ghani & Anor, [1990] 2 M.L.J. lxxv (Fed. Terr. Syariah App. Bd. 1990). The board applied Hanafi doctrine because of the identity of the parties. See *infra* n. 364.

359. Jasni bin Adbul Rahim v. Rahmah bte. Mohd. Jono, [1992] 1 M.L.J. cxliii (Fed. Terr. Syariah App. Bd. 1991). The Board applied Hanafi doctrine because of the identity of the parties. See *infra* n. 364.

360. Rojmah bte. Adbul Kadir v. Mohsin bin Ahmad, [1991] 3 M.L.J. xxx (Fed. Terr. App. Bd. 1991). The board's hostility to the simultaneous triple talak is transparent. It stated flatly that "a person who wishes to divorce his wife should pronounce one talaq at a time," *id.* at xxxii. Upon pronouncement of irrevocable divorce, the husband is generally liable to pay the balance of the bride price as well as a consolatory gift and the wife's share of jointly-held property. One payment to which the wife is not entitled if the divorce is irrevocable is maintenance during the *eddah* period, which lasts for 100 days after the pronouncement of a talak. This is likely an additional reason for the reluctance of appeal boards to confirm divorce in talak tiga cases.



on the husband, who must produce witnesses.<sup>361</sup> Noting that the act provides only for talak in court, the board went on to point out that talaks are pronounced in court only one at a time.<sup>362</sup> If that is so—and it surely is—then the talak tiga problem dissolves. Extrajudicial talaks are invalid, and so are multiple, simultaneous talaks. Rather than go this route, however, the board simply determined that a kadi must take great care in evaluating a pronouncement of three talaks.

Had the Federal Territory Appeal Board taken the logic of the Selangor Appeal Committee in *Zainab* to the next step and determined that, since extrajudicial talaks are invalid, there can never be three talaks at once,<sup>363</sup> the dissonance with Malaysian Islam would have been enormous. This reading of the statute, however, would have been unassailable.

By the same token, the Federal Territory model implicitly provides for recourse for some purposes to any of the Sunni schools,<sup>364</sup> and we have seen that the statute itself borrows from other schools.<sup>365</sup> So in principle the board could have chosen the non-Shafi'i rule that three talaks simultaneously pronounced amount only to one. This it has never done unless the husband belongs to another school. It has justified this practice by reference to a leading Shafi'i text that makes the choice of school turn on the husband's affiliation.<sup>366</sup> Yet this is a Shafi'i choice of law rule that the statute neither requires nor forbids. And so, for the time being, decisions are burdened with what may seem to be logical inconsistencies. But talak tiga is having a harder and harder time in court.<sup>367</sup> By a common law process, it is being whittled away.

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361. Id. at xxxii.

362. Id. at xxxi. The board pointedly asked "whether any action had been taken" against the husband for violating the act by pronouncing talak out of court. Id. at xxxii.

363. *Zainab v. Abd. Latif*, supra n. 331, slip op. at 4-5. The statute never speaks of simultaneously pronouncing three talaks; in-court talaks are pronounced singly. See, e.g., Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, §§ 47(3), 47(14), 48(5). Twice the Federal Territory Appeal Board has come close, saying that there seems to be nothing in the statute allowing for registration of divorces pronounced outside of court, *Re Mohd. Hussin*, supra n. 358, at lxxv; *Rojmah*, supra n. 360, at xxxi, but in each case it has decided the matter on other grounds.

364. Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 2(1): "Hukum Syara' means the laws of Islam in any recognized sects . . ." This broad definition is not necessarily a blanket authorization to choose rules freely from among the various schools, for the term *Hukum Syara'* appears at various specific points in the statute and requires definition in those contexts. See, e.g., id., §§ 52(1)(l) (fasakh grounds), 60 (liability for maintenance). But it was pursuant to section 2(1) that the board in *Re Mohd. Hussin*, supra n. 358, at lxxvi, stated it was "justified" in looking to Hanafi rules, thus implying that section 2(1) might provide fairly wide-ranging authorization for the choice of any appropriate rule in the course of litigation.

365. See supra at 269, 281-82, 287.

366. *Re Mohd. Hussin*, supra n. 358, quoting Nawawi, supra n. 193, at 337-38.

367. In addition to the cases discussed, see Mohaygen A. Naing, supra n. 160, at 142-43.

In all of these cases, and inevitably in all statutory formulations of revealed law, there is dual-track reasoning. The statute is interpreted, and then it is demonstrated that the statute, so interpreted, accords with the proper Islamic view of the matter. (Or, in the Federal Territory talak tiga case, the appeal board concedes that, since the statute does not provide for extrajudicial talak, initial "recourse must be had to the [nonstatutory] sources of Islamic law."<sup>368</sup> Either way, there is in principle no power to vary Islamic law.) It is hardly surprising that the statute, which is drafted to read like any statute in the secular law, will be interpreted by methods familiar to Malaysia's common law judges. What is less evident until one focuses on it is that the Islamic sources are interpreted by the very same methods.

An excellent example is provided by the judgment of the appeal committee in *Aishah v. Wan Yusof*,<sup>369</sup> the polygamy case. There is a verse in the Qur'an that reads "If you fear that you shall not be able to deal justly with orphans, marry women of your choice—two, three, or four. But if you fear that you shall not be able to deal justly with them, then marry one. That will be more suitable to prevent you from doing injustice."<sup>370</sup> This is the verse widely thought to authorize polygamy on a liberal basis. In dealing with it, the committee noted that "the first limb" of the passage is permissive, the second prohibitive.<sup>371</sup> It then proceeded to say that both limbs must coexist, and since the statute does not abolish polygamy but purports merely to insure justice to wives, it is not incompatible with the restrictive verse.<sup>372</sup>

Wan Yusof had also contended, and the kadi had agreed, that a good reason for granting permission for the second marriage was that otherwise the sin of adultery might result. Construing the statute, the appeal committee held that this could not justify the permission. Wan Yusof must be "in control of his desires and be able to restrain himself from committing adultery and other sinful deeds,"<sup>373</sup> particularly inasmuch as "Aishah has no physical defects and has adequate sexual feelings and has never objected to sexual relations."<sup>374</sup> But then the committee had to confront the kadi's Islamic grounds for

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368. Re Mohd. Hussin, *supra* n. 358, at lxxv. The board also notes that the statute makes it an offense to pronounce extrajudicial talak—which it concedes is allowed in Islam—but states that the offense "appears to be ignored so far by the Syariah Court." *Id.* To complete the paradox, the board hints in *Rojmah*, *supra* n. 360, at xxxii, that on remand the kadi's court ought to think about punishing the husband for the offense of pronouncing talak out of court. All of this while still enforcing—reluctantly—extrajudicial talak.

369. *Supra* n. 337.

370. Quoted in *id.* at lxiii.

371. *Id.*

372. *Id.*

373. *Id.* at lxii.

374. *Id.* at lxiii.

permission, which depend on a *hadith* (an authoritative saying of the Prophet). Here is how the committee dealt with the problem:

The learned judge relies on the legal ruling which states that a person is obliged to marry if he is able to fulfil the sexual needs of the wife and he fears that he will be drawn to commit zina [the sin of fornication] or some wrong and he is also able to provide maintenance for the wife. In our opinion this ruling is addressed specifically to young men who are unmarried, and it is based on the *hadith* as told by Abdullah bin Masod, which is to the effect:

Oh young people whoever among you is able to marry should marry for it keeps you from looking at strange women and preserves from unlawful intercourse. (Sunan Abu Dawud *Kitab Al Nikah* Vol 2 p. 544).

If the unmarried young men are capable of doing so, that is both physically and materially, they should marry because if they do not so they may be tempted to commit zina or sinful act[s]. Therefore, the *hadith* relied upon by the learned judge of the Syariah Court is wholly irrelevant on the facts of the present case.<sup>375</sup>

In short, concluded the appeal committee, the *hadith* applies only to first marriages.

The committee gave the *hadith* the same treatment it might have given to a prior decision: it distinguished it. The judgment manifests the usual common law antipathy to deduction and abstract principles, and its affinity for context or what Karl N. Llewellyn called "situation sense."<sup>376</sup> The technique of the appeal committee raises no eyebrows in the common law world, but it is not the usual Islamic exegesis, which, many commentators have pointed out, is unusually deductive and, when creative, mainly analogical.<sup>377</sup>

Two more recent Selangor cases are even more thoroughly suffused with common law method. In *Fakhariah bte. Lokman v. Johari bin Zakaria*,<sup>378</sup> a husband and wife had remarried after their first divorce. The husband had duly executed a *taklik*, a statement promising that if he failed to maintain the wife for four months, "according to the custom,"<sup>379</sup> the wife could secure a divorce. After a quarrel, the

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375. Id. at lxiii.

376. *The Common Law Tradition: Deciding Appeals* passim (1960).

377. For depictions of classical Islamic legal reasoning, see Wael B. Hallaq, "Legal Reasoning in Islamic Law and the Common Law: Logic and Method," 34 *Clev. St. L. Rev.* 79 (1985-86); Messick, *supra* n. 339, at 112-16; Rosen, "Islamic 'Case Law' and the Logic of Consequence," in *History and Power in the Study of Law*, *supra* n. 23, at 302-19.

378. [1993] 1 M.L.J. lxxvii (Selangor Syariah App. Bd. 1992).

379. Id. at lxxviii.

wife left the marital home and thereafter received no maintenance. A year and a half later, she sued for divorce based on the taklik. Following standard doctrine, the kadi held that the wife's right to maintenance was conditioned on her obedience. When she left home without her husband's permission, she exhibited recalcitrance (*nusyuz*), which precluded maintenance and the award of a divorce based on a failure to provide it. Reversing the kadi and neglecting the language in the taklik about "custom," the Selangor Appeal Board decided that, as the taklik was framed in unconditional terms, recalcitrance is no defense. In any case, said the board, if there is a doubt about the terms of a taklik, the document should be construed against the husband.<sup>380</sup> If the importation of this common law principle of construction were not enough, the board went on to distinguish an earlier case in which a kadi had held that a taklik that is silent on the wife's duty of obedience cannot override that duty, which derives from divine law.<sup>381</sup> In that case, the kadi had found the wife to have been obedient, and so the point was not squarely decided. But even if it were, concluded the appeal board in an explicitly alternative holding, Fakhariah's husband had never obtained a judicial order of recalcitrance against her and so is disabled from raising the matter as a defense to the divorce action.<sup>382</sup>

The *Fakhariah* judgment was written by Tan Sri Haji Mohamed Azmi, a secular court judge who also delivered the judgment in *Noryati bte. Tasrip v. Hamid bin Che Mat*,<sup>383</sup> in which a husband had sued to confirm an order of marital reconciliation (*rujuk*). To be effective to revoke a divorce, such a reconciliation would have to have been accomplished within the 100-day *edda* period during which certain divorces are still revocable. Hamid, however, had stated two different dates in his documentation, one of them beyond the *edda* period. Accordingly, the Registrar of Muslim Marriages had declined to register the *rujuk*, whereupon Hamid managed to persuade the kadi's court to declare the *rujuk* valid. On appeal, the kadi was reversed. Where the wife denies that *rujuk* took place within the appropriate period, the burden falls on the husband to produce two witnesses to the *rujuk*. No such witnesses were produced, and the *rujuk* is thus not registrable. An earlier case<sup>384</sup> was distinguished on the ground that there the wife did not contest the validity of the *rujuk*, rendering earlier statements of the board dispensing with the

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380. *Id.* at lxxix.

381. *Aisny bte. Mohamed Davis v. Haji Fahro Rozi bin Mohdi*, [1990] 2 M.L.J. xxvi (Fed. Terr. Syariah App. Comm. 1989).

382. *Fakhariah*, *supra* n. 378, at lxxix-lx.

383. [1993] 1 M.L.J. cxxxix (Selangor Syariah App. Bd. 1992).

384. *Siti Hawa bte. Mohamed v. Mohamed Redzuan*, [1992] 1 M.L.J. cxcix (Selangor Syariah App. Bd. 1990).

need for witnesses *obiter*—fortunately so, since the Qur'an provides that witnesses are needed.<sup>385</sup>

Qur'anic interpretation is here mixed with common law doctrine and method. The interpretation of documents, the use and avoidance of precedent, the resort to alternative holdings, the invocation of burden of proof: all proceed according to common law practice, which shapes the outcome. In *Fakhariah*, the wife's production of male and female witnesses is held to be sufficient on a plain reading of the statute. In *Noryati*, the husband's failure to produce any witnesses defeats his case, on burden of proof grounds. In the former, the effect of eliminating a recalcitrance defense to a *taklik* divorce is to put Selangor in conflict with other states and to weaken the wife's traditional duty to obey her husband, a duty which has long made it legally perilous for a wife to leave an unhappy marital home.<sup>386</sup> In the latter case, the effect might be to spread the seeds of an emerging doctrine that no reconciliation will be held effective merely because the husband unilaterally pronounces it.<sup>387</sup> The core substantive doctrines expounded by common law method are thoroughly Islamic in origin, but it is a decidedly progressive, reshaped version that emerges from the hand of the judges.

Beginning in the nineteenth century, as we have seen, Islamic law has been subjected to the mercies of common law judges, at first British and now Malay. The incremental movement to a new law is methodologically familiar, even when the Islamic sources are not. The *Shariah* in Malaysia is thus doubly affected by the common law. In the first place, it is surrounded by a much larger body of British-derived secular principles, some of which, insofar as they apply to non-Muslims, cover the same fields as those which apply to Muslims. This is the case with family law. There has been a discernible tendency to reduce the dissonance between the two bodies of law, both by legislation and by judicial decision. In the second place, the galloping codification of Islamic law beginning in the 1980s has placed a large

385. *Noryati*, supra n. 383, at cxli-cxlii.

386. In some states, *nusyuz* is a common defense to a *taklik* action. Sharifah Zaleha, supra n. 241, at 192-93; Sharifah Zaleha, supra n. 195, at 6-7, 11.

387. The appeal board in *Noryati*, supra n. 382, at cxliii, stated that "[i]n any case, as the wife has not consented to the *ruju'*, the court has no authority to order the registrar to register it." What the board seemed to be referring to is the requirement, in the Federal Territory and Kelantan models, that a wife may not be ordered to resume relations after a *rujuk* to which she has not consented. Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 51(9); Kelantan Islamic Family Law Enactment 1983, No. 1 of 1983, § 39(4)(b). Under these sections, her failure to consent triggers appointment of the same sort of conciliatory committee appointed in cases of divorce by reason of irretrievable breakdown. If the conciliatory proceedings lead to stalemate, the arbitrators appointed may ultimately effect a divorce. By implication, then, for a *rujuk* to be valid a wife must consent. With the abolition of unilateral pronouncements of divorce, it stands to reason that unilateral pronouncements of reconciliation will come under scrutiny. In various ways, the family law enactments penalize unilateral *rujuk*. See supra n. 216.

number of relatively more specific statutory provisions before the Islamic courts for interpretation. It stands to reason that, in interpreting statutes and Islamic sources simultaneously, the same interpretive method might be applied to both—which is exactly what has happened, at least in some appeal committees. In the end, this common law transformation may be the latent meaning of “upgrading” the Shariah courts.

*B. Marital Property and Consolatory Gifts: Changing Law, Changing System*

Upon divorce, a Muslim woman in Malaysia is entitled to several forms of payment.<sup>388</sup> These include any unpaid portion of the *mas kahwin* or dowry and other gifts promised to the wife at the time of marriage, full payment of which is often deferred; maintenance and accommodation for the period of 100 days following a revocable divorce, at which point it becomes irrevocable and the wife receives no further maintenance; the wife's share of the *harta sepencarian* or jointly acquired marital property; and *muta'ah*, a required consolatory gift payable to a wife who has been divorced without fault.

If the divorce is by mutual consent, the parties may agree on the amounts due. Sometimes, to induce consent, the wife waives payment of some or all of these obligations. In practice, whether by agreement or default, the husband often pays little or no maintenance or *muta'ah*. In a large urban survey from the 1970s, more than a third paid no maintenance, and 90 percent paid no *muta'ah*.<sup>389</sup> When it was paid, *muta'ah* formerly consisted of only a token amount, perhaps as low as M\$10 (approximately U.S.\$4) and rarely more than M\$100.<sup>390</sup> These practices, however, are beginning to change, as kadis and lawyers become more diligent about enforcement and as the legal obligations themselves expand.

The formal outlines of the obligations appear timeless, but their scope and content have been growing. This is particularly true of *harta sepencarian* and of *muta'ah*. The role of economic change, of the Shariah bar, of judges, and of statutes and practices (both Islamic and secular) in bringing about the reconfiguration of legal obligations provides important clues to the various combinations of elements that produce systemic legal change.

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388. For a survey, see Supiah Meon, “Financial Provisions: Maintenance and Property—The Law Applicable to Muslims,” in *Women and the Law*, supra n. 210, at 24-36. See also Abdul Kadir bin Yusof, “Women and the Law,” [1975] 2 M.L.J. xxi (before the family law enactments codified the obligations); Ahmad Ibrahim, supra n. 248, at xvi-xvii (Singapore law, which is generally similar).

389. Azizah, supra n. 243, at 99-101, 102-03.

390. See id. at 103; Djamour, supra n. 126, at 111, 162 (Singapore practice from 1960s); Ahmad Ibrahim, supra n. 248, at xvii (same).

### 1. Marital Property: Merging and Emerging Law

Harta sepencarian is an institution of marital property. The historical core of the institution holds that property (usually land) acquired or improved during marriage by means of the joint resources or joint labor of husband and wife belongs to both of them and will be divided into shares upon divorce or death.<sup>391</sup> The woman's share in such property, titled in her husband's name, has been variable over time and place, but generally it has been put at one-half, one-third, or a fraction directly proportionate to her contribution.<sup>392</sup> Although frequently confused with the Islamic concept of *harta sharikat* or partnership,<sup>393</sup> harta sepencarian derives instead from pre-Islamic Malay *adat* or custom.<sup>394</sup> It may have roots in the matrilineal society of Negeri Sembilan,<sup>395</sup> aspects of which have affected custom in other states,<sup>396</sup> although similar marital property rules can be found among non-matrilineal Muslim groups elsewhere in Southeast Asia.

The doctrine of harta sepencarian has the potential, at several points, to conflict with Islamic rules.<sup>397</sup> The Sunni law of intestate succession, in effect in Malaysia, allocates to a widow a one-eighth share if there are surviving children, one-quarter if not.<sup>398</sup> The maximum share is less than what the wife will probably receive on harta sepencarian property at her husband's death.<sup>399</sup> If this conflict is usually averted, that is only because amicable agreement among relatives accords the widow a share larger than Islamic law does.<sup>400</sup>

391. See Hj. Salleh bin Hj. Buang, *New Frontiers in Harta Sepencarian* 5-9 (1988). Sometimes joint efforts were not required. *Id.* at 10-12.

392. *Id.* at 17, 21, 38-39, 41.

393. *Id.* at 10, 44; Hooker, *supra* n. 107, at 240-48.

394. *Zainoon v. Mohamed Zain*, [1981] 2 M.L.J. 111 (Singapore Shariah App. Bd. 1978); Abdul Majid Nabi Baksh, *Muslim Divorce: Ancillary Orders* 34-37 (unpublished manuscript, n.d., ca. 1992).

395. Ahmad Ibrahim, "The Muslims in Malaysia and Singapore: The Law of Marital Property," in *Family Law in Asia and Africa*, *supra* n. 209, at 195 (reporting that the rule belongs to the matrilineal adat).

396. Taylor, *supra* n. 106, at 8-9 (noting that traces of matrilineal adat were visible in south Perak property distributions).

397. Many authorities state that Islam recognizes only separate property, even during marriage. See Mustafa O. Abubaker, *Property Rights During Marriage and Divorce* 91 (1980); M.B. Hooker, *The Personal Laws of Malaysia* 21 (1976); David Pearl, *A Textbook on Muslim Personal Law* 75 (2d ed. 1987).

398. Susan M. Redick, *Islamic Law of Succession and Its Application in Malaysia and Singapore* 17 (unpublished paper, Duke Law School, Spring 1993).

399. Under Sunni rules enforced in Malaysia, a male spouse also inherits twice what a female spouse inherits, Abdul Kadir, *supra* n. 388, at xxv, whereas harta sepencarian often provides for equal division of marital property on the death of either. Once the harta sepencarian share has been severed, the spouse is also eligible to inherit the appropriate share of the remaining estate. See Mehrun Siraj, *supra* n. 126, at 45. In practice, however, it remains an open question how frequently such double division occurs. See *infra* n. 400 and accompanying text.

400. Ahmad Ibrahim, *Family Law in Malaysia and Singapore* 294-95 (2d ed. 1984) ("The fact that the Muslim law allows distribution of the estate of a deceased person to be settled by consent of the heirs has enabled many arrangements which are in

Of course, a conflict between Islamic law and harta sepencarian depends on a prior finding that the wife's share is actually part of the husband's estate—which, however, is the very thing in issue—and there are ways to conclude that it is not. One way is to treat the wife's share as a debt to be deducted from the estate before it is subject to distribution.<sup>401</sup> Such treatments become more difficult as the concept of marital property expands. Some cases hold that the wife's entitlement may accrue wholly as the result of doing housework while the husband acquired property in his name out of his own resources<sup>402</sup> or as the result of simply accompanying the husband on business trips.<sup>403</sup> Neither of these activities would give the wife any property interest under Islamic law.<sup>404</sup>

Despite such conundrums, harta sepencarian has survived and expanded. The property concerned is not restricted to land but extends to movable property—in one case, boats and fishing nets.<sup>405</sup> As recently as the 1970s, it was plausible to think that in some states a claim to a share of marital property had to rest on equal capital or labor in its acquisition.<sup>406</sup> Although shares are still variable by state and somewhat unpredictable by court, an equal contribution of labor or capital is generally not required to obtain a share. As already noted, housework that leaves a husband free to acquire property may be sufficient,<sup>407</sup> and so is a wife's "constant companionship [that] was responsible for the [husband's] peace of mind which enabled him to function effectively as a businessman."<sup>408</sup> To be sure, a direct contri-

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reality application of the *adat kampong* [village custom] to pass as distributions according to Islamic law."); Taylor, *supra* n. 106, at 10 ("The fact that the Muhammadan law allows distribution of the estates of deceased persons to be settled by consent of the heirs has enabled many arrangements which were in reality application of *kampong* custom to pass as distributions according to Muhammadan law . . ."). In litigation, the problem is not so easily solved. See Ahmad Ibrahim, *supra* n. 395, at 195-96 (discussing cases in which Quranic distributions superseded harta sepencarian and vice versa).

401. Hj. Salleh, *supra* n. 391, at 33-34.

402. Rokiah bte. Haji Abdul Jalil v. Mohamed Idris bin Shamsudin, [1989] 3 M.L.J. ix (Fed. Terr. App. Bd. 1989).

403. Boto' binti Taha v. Jaafar bin Muhamed, [1985] 2 M.L.J. 98 (High Ct. 1983).

404. Cf. Mannan, *supra* n. 168, at 59 (presumption that cash and household furniture belong to husband); Takuma Abe, *A Comparative Study of Islamic Ownership* 34-37 (Institute of Middle Eastern Studies, International University of Japan, Working Paper No. 10, 1987) (labor as basis of ownership); Ahmed H. Al-Maamiry, *Economics in Islam* 54-57, 83 (1987) (various methods of acquiring ownership); Muhammad Muslehuddin, *Economics and Islam* 99 (1974) (same); Anwar Ahmad Qadri, *Islamic Jurisprudence in the Modern World* 171-80 (1963) (same); Joseph Schacht, *An Introduction to Islamic Law* 136-38 (1964) (same).

405. Boto', *supra* n. 403.

406. See Ahmad Ibrahim, *Islamic Law in Kelantan—1978*, [1980] 2 M.L.J. xxxiii, xxxiv (remarking that this is a difficult standard). See also Ahmad Ibrahim, *Family Law in Malaysia and Singapore* 253 (2d ed. 1984) (recounting older cases in which household work entitles wife to no share).

407. Rokiah, *supra* n. 402.

408. Boto', *supra* n. 403, at 100.



bution, such as cultivation of land, would generally entitle a wife to a larger share, typically one-half, but if the wife contributes "indirectly" (as in the case of business trips), she might receive a one-third share; indeed, she is "automatically entitled" to it.<sup>409</sup>

However dubious as a matter of Islamic law, the intangible contribution as a basis for a share is now well established. In *Mansjur bin Abdul Rahman v. Kamariah bte. Noordin*,<sup>410</sup> a divorced wife sought a share in property her husband had been able to acquire only because she was a citizen, which he was not. Referring to the Islamic principle of *musha*, which mandates the equal division of separately owned property that has become commingled, the Federal Territory Appeal Board, concerned to ground harta sepencarian in Islamic law,<sup>411</sup> remarked that "it seems justifiable to extend the principle to cases of claims to *harta sepencarian*."<sup>412</sup> Partly because the property could only have been obtained because of the wife's citizenship, the board confirmed the kadi's award of a half share to her in *Mansjur*. Even social position can constitute a contribution. In *Tengku Anun Zaharah v. Dato' Dr. Hussein*,<sup>413</sup> the wife, a member of the Pahang royal family, had helped her commoner husband obtain a state title and made it easier for him to do business. The husband had given her substantial sums of money to finance her business at one of the properties he acquired. Still, her claim to a share of property he acquired, based on her indirect contribution, was upheld.<sup>414</sup> Neither labor nor capital is now required.

Harta sepencarian cases now fall within the jurisdiction of the Shariah courts, and the family law enactments empower the court in divorce cases to order "division between the parties of any assets acquired by them during the marriage by their joint efforts."<sup>415</sup> Previously, many such claims came to the secular courts, and many of the expansive judgments were written by secular judges.<sup>416</sup> The liberal

409. Id. at 101. But see *Zainuddin v. Anita*, 4 J.H. 73 (Fed. Terr. App. Bd. 1982) (rights due to unequal contributions depend on mutual consent of the parties).

410. [1988] 3 M.L.J. xlix (Fed. Terr. App. Bd. 1988).

411. Id. at xl ("[T]he Shariah Court and the Board of Appeal in their endeavour to apply the Islamic law must attempt to find support for the rule of harta sepencarian in Islamic jurisprudence").

412. Id. at li.

413. 3 J.H. 125 (Selangor Chief Kadi's Court 1980).

414. But only as to one of several plots of land.

415. Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 58(1). For jurisdiction to lodge in the Shariah court, it must, of course, be determined that the assets in dispute are harta sepencarian assets. If not, the secular courts may still have jurisdiction. *Noor Jahan v. Md. Yusoff*, [1994] 1 M.L.J. 156, 161-63 (High Ct. 1993).

416. *Boto*, supra n. 403; *Mohamed v. Commissioner of Lands and Mines Terengganu*, [1968] 1 M.L.J. 227 (High Ct. 1968); *Roberts alias Kamarulzaman v. Ummi Kalthom*, [1966] 1 M.L.J. 163 (High Ct. 1966). But see *Noor Jahan v. Md. Yusoff*, supra n. 415, at 163 (enunciating the narrower, earlier doctrine, albeit on facts probably insufficient to create a harta sepencarian claim under current doctrine).

doctrines of these judges have been embraced and even extended by the Shariah courts. In some other areas of custom, Islamic revivalists have attempted to purify Malay practice of excrescences deriving from adat or from non-Islamic foreign influences: the worship of *keramats*, places or persons with supernatural powers, is a good example. But, in marital property, appellate bodies have crafted expansive doctrine while attempting to fuse harta sepencarian to Islamic sources.

*Mansjur* is the epitome of this syncretic effort, replete as it is with citations to Islamic textbooks, hadiths, and Malaysian state *fatwas* (legal rulings issued by a mufti or a committee of ulama), as well as to prior cases based on adat practice. In *Mansjur*, the appeal board takes the very different Islamic principle of *musha*—a principle of separate property that actually seems irrelevant to the adat concept of joint marital property—and uses it to create a property interest deriving from a contribution based on neither labor nor capital but on marital status.<sup>417</sup> The fusion of Islamic sources, adat practices, and common law methods is striking.

Since the family law enactments came into effect, such interpretive acts are performed in the shadow of the statute. When the statutes are examined, another powerful foreign element is added to the mix. The Federal Territory provisions on marital property are lifted directly from the secular provisions and indirectly from the English statutory law.

Here, as on some other matters, Kelantan and Perak enacted provisions significantly different from those of the Federal Territory model followed by all other states. The Kelantan-Perak provisions authorize the court, at the time of divorce, to divide property acquired by husband and wife “during the marriage by their joint efforts” and also to divide the proceeds of sale of such property.<sup>418</sup> The result of the division need not be a foreordained percentage but is merely to be “reasonable.” In calculating the shares, the two statutes say, courts should take account of (1) the contributions of each party in money, property, or labor toward the acquisition of the asset, (2) any debts incurred by either party for their joint benefit, and (3) the needs of minor children, if any.<sup>419</sup> These two states define harta sepencarian narrowly to include assets acquired jointly by the exercise of “efforts and capital contributed by each party.”<sup>420</sup> Construed strictly, the statutes would foreclose the award of a share based solely on indirect

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417. *Mansjur*, supra n. 410, at l-ii.

418. Kelantan Islamic Family Law Enactment 1983, No. 1 of 1983, § 46(1); Perak Islamic Family Law Enactment 1984, No. 13 of 1984, § 54(1).

419. Kelantan Islamic Family Law Enactment 1983, No. 1 of 1983, § 46(2); Perak Islamic Family Law Enactment 1984, No. 13 of 1984, § 54(2).

420. *Id.*

contribution, the sort of contribution recognized in *Mansjur, Tengku Anun Zaharah*, and other cases.<sup>421</sup>

The Federal Territory model, adopted in every state other than Kelantan and Perak, contains the same basic provisions regarding division of property acquired by joint efforts during the marriage, except that, subject to the same three considerations to be taken into account in arriving at a division, "the Court shall incline towards equality of division."<sup>422</sup> The Federal Territory and all the states following it then add further subsections missing in the Kelantan and Perak statutes. These deal squarely with the indirect or constructive contribution of a spouse, as they reaffirm the right of one party to a marriage to a share of assets acquired through the sole effort or capital of the other.<sup>423</sup> In dividing such assets, the statutes provide, the court should consider "the extent of the contributions made by the party who did not acquire the assets to the welfare of the family by looking after the home or caring for the family . . ." as well as the needs of minor children; subject to these considerations, the division should be "reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion."<sup>424</sup>

Now, of course, this language does not, by itself, authorize a share based on citizenship status, accompaniment on business trips, or membership in an influential royal family, but these are modest interpretive extensions of the provisions, whereas they are a much greater stretch from the Kelantan-Perak provisions. Conceivably, bifurcated doctrine may emerge among the states. Before the statute was enacted, Kelantan courts occasionally had a narrower view of contributions eligible for a harta sepencarian share.<sup>425</sup>

The main source of the expansive Federal Territory provisions does not lie in the liberal harta sepencarian cases but—interestingly enough—in the statutory provisions applicable to non-Muslims. The Federal Territory provisions on marital assets are all virtually identical to those of the secular Law Reform (Marriage and Divorce) Act 1976,<sup>426</sup> from which they were obviously lifted wholesale. The borrowed secular provisions are enforced in courts sitting solely to decide

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421. See *supra* nn. 402, 403, 410, 413.

422. Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 58(1). Among states following the Federal Territory model, only Pahang provides for "such division as is reasonable," rather than inclining toward equal division. Pahang Islamic Family Law Enactment 1987, No. 3 of 1987, § 59(2).

423. Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 58(3).

424. *Id.*, § 58(4). This looks as if a two-to-one ratio were contemplated, as in some of the cases allocating one-third for indirect contribution.

425. See Ahmad Ibrahim, *supra* n. 406.

426. Act 164, 1976, § 76. Section 76 is nearly verbatim with section 58 of the Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, down to the matters to be taken into account in deciding on division, the inclination to equal or reasonable shares (and shares weighted by contribution), as well as the definition of "assets acquired during a marriage."

cases under Islamic law. Here, then, is a direct legal transplant from one sector of a legal system to another purporting to be animated by different and to some extent unalterable principles.

There is also a striking similarity of judicial doctrine on the secular and Islamic sides. Adultery of a spouse does not preclude a claim for division of marital assets under the secular law,<sup>427</sup> and neither does it defeat a claim to *harta sepencarian*.<sup>428</sup> Some authors suggest that this rule confirms definitively that *harta sepencarian* is founded on adat rather than on Islam, since adultery would preclude claims founded on Islamic law, to maintenance,<sup>429</sup> for example, or to *harta sharikat*.<sup>430</sup> (This, however, is an argument that proves too much, since rules incompatible with Islam ought not to find legal recognition, and the Islamic disapproval of adultery is unequivocal.) Judicial recognition of the companionship contribution of a spouse who advanced neither capital nor labor to acquire the property is also exactly the same as the recognition accorded to such a contribution in English law<sup>431</sup> and in Malaysian secular law under the Law Reform (Marriage and Divorce) Act.<sup>432</sup>

Not all of this similarity can be attributed to direct statutory borrowing, for the doctrinal evolution was well underway before the Islamic family law enactments were passed. Rather, the cases presented well defined, conventional opportunities for the usual common law development. Judges probably also found it inconceivable, knowing the secular law as they did, that Muslim wives should be left with less marital property than non-Muslim wives were. But with the direct borrowing of the *harta sepencarian* provisions from the marital asset provisions applicable to non-Muslims (which provisions bear some resemblance to those of the English Matrimonial Causes Act 1973<sup>433</sup>), and with the confirmation of their liberal interpretation as a matter of Islamic law, the marriage of adat, English law, common law method, and Islamic law was consummated. A right originating in custom is framed in terms similar to those of English law and reconceptualized as Islamic by statute and judicial decisions. *Harta sepencarian* is still emerging law, and it is also merging law—an example of the strongest possible syncretism.

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427. See Suzanna Mohamed Isa, *Harta Sepencarian: An Overview* 56 (1991) (unpublished LL.B. Honours project paper, Universiti Kebangsaan Malaysia).

428. See Hj. Salleh, *supra* n. 391, at 6-8.

429. See *id.* at 7; Suzanna, *supra* n. 427, at 36. See also Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 65(1) (right of divorced wife to receive maintenance ceases on adultery).

430. See Abdul Majid, *supra* n. 394, at 34.

431. See Suzanna, *supra* n. 427, at 48 n. 2.

432. See *id.* at 56-59 (description of cases decided under the statute applicable to non-Muslims).

433. C. 18, §§ 24-25. In section 24, however, the English act contains options beyond mere division of marital property; and, in section 25, it mandates that the courts take account of a wider range of circumstances than the Malaysian acts do.

## 2. Consolatory Gifts: Clarified Doctrine, Enhanced Enforcement

If these were the forces at work in harta sepencarian cases, a slightly different configuration has been involved in muta'ah cases. Until recently, there were few muta'ah claims, and the amounts recovered were trivial. Neither is true now. The computation of muta'ah was regarded by courts and commentators as antiquated and conceptually impoverished. In recurrent cases, particular judges have taken the lead in spelling out the entitlement, and the growth of a Malay propertied middle class and a Shariah bar with financial incentives to bring larger claims has breathed new life into the law of consolatory gifts. In contrast to marital property, these developments have proceeded without explicit reference to the law applicable to non-Muslims, but they may still produce parallel results.

No doubt the changing economic condition of the Malays since the 1970s—their increasing urbanization, representation in commerce and the professions, and participation in the modern sector of the economy—also played a role in harta sepencarian doctrine. The more property is owned, the more claims to joint ownership are plausible; Malays clearly own more now, particularly in and around Kuala Lumpur, where much of the new law is being made.

The muta'ah obligation, however, is open-ended. Harta sepencarian requires a fractional share of a fixed quantum of property. The muta'ah statutes do not relate to specific property. They simply require that a woman who "has been divorced without just cause" be paid an amount that is "fair and just," "appropriate and just," or "appropriate and fair."<sup>434</sup> The relevant Quranic verse requires divorced wives to be provided with a "gift of reasonable amount," from the "wealthy [husband] according to his means, and the poor according to his means."<sup>435</sup> The principal inquiry is thus into the husband's ability to pay, and that ability is much greater than it formerly was.

434. Islamic Family Law (Federal Territory) Act 1984, Act 303, 1984, § 56 ("fair and just"); Kelantan Islamic Family Law Enactment 1983, No. 1 of 1983, § 44 ("appropriate and just"); Kedah Islamic Family Law Enactment 1979, No. 1 of 1984, § 47 ("appropriate and fair"). Only Malacca has no explicit requirement (though it is likely implicit) that the woman be divorced without just cause, and Malacca also does not specify that she be divorced by the husband, the implication being that she may initiate the divorce and still receive muta'ah. Malacca Islamic Family Law Enactment 1983, No. 8 of 1983, § 44. Even if the wife is the plaintiff, she may still recover muta'ah if the divorce action is for taklik (since the husband's breach of condition would be wrongful), possibly even for khul', but perhaps not for fasakh. See Zalikhah binti Mohd. Nor, "Mut'ah di dalam Islam [Muta'ah in Islam]," 3 J.H. 147, 153 (1983). See also Sharifah Sapoyah v. Wan Alwi, 6 J.H. 259 (Sarawak Chief Kadi's Ct. 1988) (muta'ah in taklik and khul' but not fasakh); Noor Bee v. Ahmad Shanusi, 1 J.H. 63 (Penang Chief Kadi's Ct. 1978) (muta'ah in khul' but not in fasakh); Zaitoon Dato' Othman, "Hak Wanita Menuntut Mutaah [Women's Rights to Claim Muta'ah]," *Malays. L. News*, Jan. 1993, at 8, 9 (no muta'ah in fasakh cases).

435. *The Glorious Quran*, supra n. 305, at 94-95.

Several conventions formerly limited muta'ah. One was that muta'ah was voluntary, and at most the kadi could cajole a bit more out of the husband than he was initially willing to pay. Another was that the amount should not exceed half of the mas kahwin (dowry), which is relatively small in Malaysia.<sup>436</sup> A third was that muta'ah is a form of compensation for service that ought to vary with the length of the marriage: a common calculation was M\$1 for each day of the marriage. This is still the rule followed by some Shariah court judges in Singapore.<sup>437</sup>

These inhibitions on muta'ah are not altogether gone in Malaysia, but they are going fast. Muta'ah is mandatory; its calculation is based on ability to pay; token payments are inadequate; and the dollar-a-day rule has been expressly repudiated by an appeal committee.<sup>438</sup> So vested is the right held to be that a wife's recalcitrance, which might deny her eddah maintenance, does not necessarily preclude her claim to muta'ah,<sup>439</sup> and her failure to cook or wash or care for her husband is deemed irrelevant, for these are not held to be obligatory chores.<sup>440</sup>

Some of these rules were laid down in a series of cases decided by the Chief Kadi of Penang, Haji Harussani bin Haji Zakaria, in the late 1970s and early 1980s. Long concerned with the proper implementation of Shariah,<sup>441</sup> Haji Harussani proceeded to award muta'ah proportionate to the husband's ability to pay.<sup>442</sup> The amounts were generally modest, but the Chief Kadi often granted muta'ah even where the wife had initiated the divorce, provided the husband was unable to prove she was at fault in breaking up the marriage.<sup>443</sup> In addition to ability to pay, the Chief Kadi also considered the status and positive demeanor of the wife; in one or two cases, the amounts seem to have been enhanced where wives had proved their devo-

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436. See Zalikha, *supra* n. 434, at 150.

437. Interviews, Singapore, January 28, 29, 1993.

438. Rokiah bte. Haji Abdul Jalil v. Mohamed Idris bin Shamsudin, [1989] 3 M.L.J. ix, xii (Fed. Terr. App. Comm. 1989); Piah binti Said v. Che Lah bin Awang, 3 J.H. 220 (Penang Chief Kadi's Ct., 1983).

439. Rokiah, *supra* n. 438, at xii. Contra: Zainoon v. Mohamed Zain, *supra* n. 394, at 113 (no muta'ah if wife deserts matrimonial home). The problem is that if the wife's recalcitrance is deemed to have caused the divorce she will be adjudged as not lacking in fault and so ineligible for muta'ah.

440. Rokiah, *supra* n. 438, at xii.

441. See the Haji Harussani Report, *supra* n. 182.

442. Piah, *supra* n. 438; Ramlah v. Mohamed, 1 J.H. 77 (Penang Chief Kadi's Ct. 1980); Zawiyah v. Raslan, 1 J.H. 91 (Penang Chief Kadi's Ct. 1980); Rahmah v. Mohamed Yusoff, 1 J.H. 75 (Penang Chief Kadi's Ct. 1979); Normaidiah v. Azhari, 1 J.H. 91 (Penang Chief Kadi's Ct. 1979); Rosnah v. Ibrahim, 1 J.H. 94 (Penang Chief Kadi's Ct. 1979); Sabariah v. Zainol, 1 J.H. 99 (Penang Chief Kadi's Ct. 1979); Noor Bee, *supra* n. 434.

443. Ramlah, *supra* n. 442; Rosnah, *supra* n. 442.

tion.<sup>444</sup> Along the way, it was made clear that the consolatory gift was not to remunerate services but rather to compensate for any embarrassment the wife might feel upon divorce, to avoid any rumors that she was at fault, and to provide her with the wherewithal to start a new life.<sup>445</sup> These are now the accepted underpinnings of muta'ah.<sup>446</sup>

On such established rules are laid the foundations for much larger claims.<sup>447</sup> In Kuala Lumpur, there have already been claims for as much as M\$5 million.<sup>448</sup> Particularly in the capital, where a Shariah bar experienced in secular litigation has developed, the financial rewards of pursuing muta'ah are considerable.

Muta'ah litigation is a source of procedural innovation. The Shariah courts are not accustomed to extended discovery, but the problem for lawyers seeking muta'ah for divorced wives is to locate and prove the husbands' assets. Lawyers are well aware of the provisions in the Islamic civil procedure enactments that if there is a lacuna the kadi is to resort to the civil rules applicable to the secular subordinate courts.<sup>449</sup> In one major case, for example, an application has been made for further and better particulars to compel the husband to disclose his assets.<sup>450</sup> If assets have been located, some of them may be liable to attachment. Moreover, where the matter is lucrative, elaborate arguments, drawn from practice in the secular courts, are increasingly pressed on the kadis.

On the other hand, husbands are also represented, and litigation planning can be practiced to avoid muta'ah. Assets can be transferred or placed in trust for children, so as to disadvantage a wife who makes claims on them.<sup>451</sup> In all of these ways, litigation in the Shariah court stands to become far more complex.

The last word has probably not been spoken on the standards for the award of muta'ah. If the kadi is to look ahead in making a consolatory award in a case where the husband is affluent, should the kadi

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444. Ramlah, *supra* n. 442 (half of husband's net salary for one month); Noor Bee, *supra* n. 434 (noting wife's dedication).

445. Noor Bee, *supra* n. 434.

446. See Ningal alias Yang Chik bte. Hashim v. Jamal bin Abdul Rahim, [1989] 2 M.L.J. xxix, xxxi-xxxii (Fed. Terr. App. Comm. 1988) (citing Penang cases with approval and enunciating similar rules); Zaitoon, *supra* n. 434 at 9-11; Zalikhah, *supra* n. 434, at 151-56.

447. Cf. Nik Noriani Nik Badli Shah, *Family Law: Maintenance and Other Financial Rights* 36-37 (1993) (arguing that muta'ah awards should be more substantial).

448. Tengku Puteri Zainah v. Dato' Seri Mohd. Najib, Civil No. 41/87 (Fed. Terr. Chief Kadi's Ct.).

449. See, e.g., Selangor Syariah Civil Procedure Enactment 1991, No. 7 of 1991, § 60(1).

450. Tengku Puteri Zainah v. Dato' Seri Mohd. Najib, *supra* n. 448 (application filed July 22, 1992). The kadi subsequently denied the application, but the general availability of procedural devices drawn from the secular sector remains.

451. Here and elsewhere in this section, I have benefited from interviews with several members of the Shariah bar in Kuala Lumpur.

consider what is needed for the wife to maintain herself beyond the eddah period, or should the kadi simply award a fraction of the husband's assets, which is the way at least some lawyers representing wives plan and shape their demands? If muta'ah is designed to give the wife a fresh start, is it not a form of a quite non-Islamic lump-sum alimony? There is every reason to think that, with standards so indeterminate, there is much room for expansion of doctrine as well as of awards.<sup>452</sup>

### 3. The Two Payments and the Sources of Change

Together, liability for harta sepencarian and muta'ah may come increasingly to deter husbands from divorcing their wives.<sup>453</sup> The doctrines, with their respect for housework and rejection of defenses based on the wife's recalcitrance, are obviously also reshaping relations between the sexes. Together, too, harta sepencarian and muta'ah may also help compensate for what is otherwise a harsh consequence of the Islamic divorce regime: no maintenance beyond the 100 days of eddah.

If the two obligations work in tandem in this way, their revival or current strength derives from two contrasting sets of developments. Harta sepencarian is a creature of Malay adat, not of Islamic law, and it has been embellished and expanded through common law adjudication and complete adoption of the secular statute, whose roots are neither in adat nor in Islam. The main source of the change, in other words, is the adjacent English legal system. Muta'ah, however, is a wholly Islamic obligation, the reconceptualization of which cannot be traced directly to adat or to common law. There is, for example, nothing in explicit, established doctrine that makes muta'ah into a kind of Islamic alimony—a concept that does not exist. But muta'ah and the ability of kadis' courts to utilize what are for them new procedural techniques seem to be in a phase of incipient expansion by virtue of the importation of litigation techniques and arguments from the same adjacent secular system. The spillover effects on the kadis' courts will be significant.

In the one case, then, the law alone has expanded. In the other, the complexity of the Shariah court as an institution is also expanding, as zealous enforcement of the clarified obligation increases. The effect of both, when the dollars have been added together, is to produce substantial changes in the de facto rights of divorced middle-class Malay women.

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452. On the inadequacy of awards and the indeterminacy of standards for deciding on the appropriate amount, see Zaitoon, *supra* n. 434, at 11, 29. On muta'ah as a kind of de facto alimony in Morocco, cf. Ziba Mir-Hosseini, *Marriage on Trial: A Study of Islamic Family Law* 90-91 (1993).

453. Which is what such financial obligations are said already to do for middle class Muslims. Azizah, *supra* n. 243, at 110.



## V. LEGAL ACCULTURATION AND THE QUEST FOR AUTHENTICITY

An old Italian maxim has it that "if things are going to stay the same around here, there are going to have to be some changes." The epigram does not, of course, describe the far-reaching Malaysian changes, which were certainly not produced to make sure that the legal system stayed the same. Yet, beneath the cynicism of the aphorism is a flash of insight that does apply in Malaysia: the flood of changes is anchored to some deep continuities in the Malaysian legal system as a whole, and many of the Islamic changes have strong connections to the secular law.

To provide a truly satisfying explanation for the adoption and content of the new body of Islamic law of Malaysia, it is necessary to move beyond the commonly articulated approaches to legal change and into more specific propositions concerning the selection of sources for legal innovation, the fit between borrowed rules and the system into which they are to be received, and the relations between sectors of dual legal systems. Above all, it is necessary to explore more fully a force that both motivates legal change and defines its scope: the quest for a legal system that is felt to be authentic. After a brief summation of how the main approaches fare against the Malaysian evidence, we shall turn to a more serious treatment of issues surrounding borrowing, dualism, and authenticity.

### A. *Approaches to Legal Change and the Mirror of Authenticity*

There is some evidence in the Malaysian materials for nearly every approach to legal change except the most deterministic. Consistent with evolutionist concepts, there is developmental change, manifested by increased complexity, institutional differentiation, and the predominance of official, lawyers' law over earlier, less formal versions. Consistent with utilitarian presuppositions, there is room to interpret at least some doctrinal changes in functionalist terms. The central theme of utilitarian approaches—cost reduction—is not much in evidence, even in commercial law, where Islamic rules regarding interest may make transactions less efficient. But the expansion of institutions such as harta sepencarian and muta'ah are compatible with a broadly conceived functionalist interpretation, insofar as they provide ways for women to escape the potentially impoverishing consequences of Islamic inheritance and divorce law.<sup>454</sup> Consistent with social change approaches, some new rules have encountered resistance where opinion or practice is more traditional.<sup>455</sup> Consistent with intentionalist views, the choice of specific rules and

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454. In part for such reasons, it appears, some countries with large Muslim minority populations have, by statute, repealed the Islamic rules of succession to property. See, e.g., A.K.P. Kludze, *Modern Law of Succession in Ghana* 229-36 (1988).

455. See *supra* at 276, 279, 282, 288-89, 546.

institutions is made by lawyers acting with some degree of autonomy, albeit lawyers set in motion by politicians. Except insofar as extreme versions of some theories postulate truly invisible hands and automatic processes, there is no necessary contradiction among the approaches.

One reason that each approach has something pertinent to say but that none excludes alternatives to it is that the approaches are cast at different levels of analysis. The closer one looks at particular rules and institutions, the more dominant the role of intentional activity seems to be. The more the emphasis is on overall patterns, the more plausible it is to explain emerging configurations in terms of evolutionary imperatives or drives toward efficiency. At an intermediate level, differences of opinion and practice among states and social groups come more into focus.

Take the growing formality of the system and role of trained lawyers. The degree to which the transformation of Islamic law is characterized by more elaborate procedural techniques and heightened professionalization is largely attributable to the particular choices made by the reformers. There is nothing inexorable about the growth of these characteristics. The more abstract evolutionary formulations neglect the incontestable fact that a different choice of reformers (ulama, for example) would have produced a completely different set of reforms, certainly one characterized by far less formality and infinitely less common law borrowing.

Or consider the role of changing opinion and social practice, which turns out to be quite complex. As indicated, differences of opinion and practice do account for the differential adoption of reforms among some of the Malaysian states, most notably Kelantan. But some other states chose one or another version of a statute much more because of professional networks among the reformers than because of any different distribution of opinion.<sup>456</sup> Where social practice and opinion do play a role, it is easier, in some cases, to attribute *resistance* to innovation to the *absence* of social change than it is to attribute the choice of legal rules and institutions to any modifications of opinion or practice. Even then, a good many revised doctrines prevail even in the face of contrary opinion; on only a few issues is dissident public opinion aroused at all. Changes in opinion among elites, from which the reformers are drawn—on polygamy and equal rights to divorce, for example—appear considerably more important than are even broadly-based changes in opinion among any other sectors.

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456. For example, former students of Professor Ahmed Ibrahim, a leading exponent of the Federal Territory model, are located in key positions in many states. Likewise, large parts of the Kelantan model appear to have been adopted in Perak because of the transfer of the Kelantan legal adviser to that state.

Furthermore, the sequence of change is the reverse of the one identified for the history of English divorce law by Lawrence Stone.<sup>457</sup> In England, judges and then legislators sought to reduce the dissonance between law and the changing social conditions that brought the law into disrepute. In Malaysia, legislative drafters and a handful of appellate judges have imposed the changes on occasionally-reluctant kadis, whose only sense of dissonance relates to the disparity between the new law and the prevailing Shafi'i doctrine. The English changes were bottom-up; the Malaysian changes have been top-down.

No approach is without substantial opposing evidence, and even together the various approaches do not explain the Malaysian changes fully. The approaches are not wrong so much as they are inadequate, because they miss an issue that must play a major part in fundamental systemic change—and the more fundamental, the more major the part it must play: the issue of authenticity. A legal system does not need merely to promote efficiency, or to align particular doctrines with particular opinions or social practices, or to follow developmental imperatives, or to suit the knowledge and interests of lawyers and reformers. A legal system must be regarded as morally appropriate for and by the people it governs.<sup>458</sup>

Quite obviously, general notions about the moral inappropriateness of the neglect of the Islamic sector of the legal system and its formal subordination to the secular sector motivated the Malaysian reforms. But the sense of inappropriateness does not determine which successor institutions will be held to be appropriate. The choice of those institutions can be a complex matter, and the Malaysian materials show it to be determined by (1) the identity of the reformers, (2) the strength of the adjacent legal system, (3) the desire of the reformers to create a new system comparable to it, and (4) the ability of the reformers to borrow from a variety of presumptively legitimate repositories of rules and institutions.

In all their efforts, the Malaysian reformers were abetted by the tolerance of the wider society—including the Islamic opposition<sup>459</sup>—for an eclectic reconstruction of the Islamic legal system. If some ulama held *a priori* standards of Islamic purity, these were generally (but not always) overcome by the reformers' diligent pursuit of a system of institutions that could match the secular system. Even Is-

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457. See *supra* at 249-50.

458. Compare Geertz's remark that authenticity is a sense that truth and falsehood, virtue and vice are "appropriately aligned." Geertz, *supra* n. 37, at 231.

459. Sharifa Zaleha, *supra* n. 128, at 6, notes, quite appropriately, that not even the *dakwah* (Islamic revival) groups have challenged the version of Shariah produced by the "present carriers of Islamic law." She implies that the reforms have legitimacy, a judgment amply supported by the overt approval or acquiescence that has greeted the vast majority of them.

lamic opposition politicians, who might have been expected to object to the borrowed content of many of the new legal norms, have been more than acquiescent. To be sure, they embarrassed the government because of its failure to implement hudud punishments,<sup>460</sup> and some of them had private reservations about the shift from informal to formal procedure or the threat that codification posed to legal exegesis from original Islamic sources.<sup>461</sup> Nevertheless, they understood that the government's reform of Islamic law was so generally satisfying to the Muslim population that it put the opposition in a difficult, defensive position.

*Pace* Savigny, one conclusion that emerges with utmost clarity from the Malaysian materials is that to be authentic a legal system does not need to be indigenous. If legal authenticity means that a people must be able to see itself in its law—and that is what it means—authenticity does not have a single face.

### *B. Borrowing and Legal Dualism*

The quest for more authentic law utilizes techniques of borrowing and transplantation; and, as Watson notes, the reformers are likely to borrow only from sources with which they are familiar. But in two respects the process goes beyond what Watson so well describes.

First, the ability of the reformers to choose new law does not belong to them alone. They are working in collaboration with political leaders. The Malaysian borrowing would have been different if the agenda of the politicians had been different, and their agenda might have been different (and probably less extensive) had they faced less political competition.

Second, the transplanting reformers were not merely reflecting professional bias in their choice of sources. They also had their eye on a larger set of issues. Although they nowhere articulated their standards in this way, the drafters and interpreters behaved as if their product had to have several attributes: (1) It had to have an Islamic pedigree, a claim to derive from Islamic sources. (2) The product had to be what they would call an up-to-date, upgraded version—a guide to conduct and process (a) that is professionally coherent and interpretable through an orderly system of adjudication, (b) that, without sacrificing Islamic morality, is not blatantly oppressive toward women, and (c) that is as efficient in its methods as the secular law is. (3) It had also to be a force propelling Malay society, often

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460. See *supra* at 260-61. The federal government has recently made it clear that it will not support the constitutional amendment that would be required for Kelantan's hudud statute to become effective. Cf. *supra* n. 149.

461. I am drawing here on an interview with a prominent Islamic law expert affiliated to the opposition Parti Islam, Bangi, Selangor, March 12, 1991.

regarded by its elites as insufficiently attuned to the requirements of the modern world, toward competitiveness, pursuit of material well-being, and characterological correctness (personal responsibility, uprightness, goal directedness). The modern character of the law was important to them. As a member of the Technical Committee wrote, one reason to keep open the door of *ijtihad* (discretion to interpret legal sources) is to enable Islamic law to keep up with the times, lest it fall into disrepute.<sup>462</sup>

This combination of implicit objectives explains much of the character of the reforms: the inclination to prefer progressive rules, drawn selectively from other Islamic schools and countries, to the unreconstructed Shafi'i law prevalent in Malaysia; the extraordinary efforts to regularize courts, kadis, and appellate bodies, as well as rules of evidence and procedure, and to subject the courts to a doctrine of precedent; the outright hostility toward irresponsibly pronounced talaks, unequal divorce rights, polygamy, failure to pay zakat, and arbitrariness in judicial procedure. These vices all become moral faults in need of legal rectification as the quest for an authentic law is linked to the search for a new Malay character.

Moreover—and this is crucial—authenticity is enhanced if the authenticated version stands up well to the competition. In the Malaysian case, the competition is the secular legal system. Hence the willingness to borrow liberally from the secular side where Islam has not spoken and to adopt even some rules in contravention of Islamic rules. Among these is the common law prohibition on hearsay—a prohibition that, while not always enforced in court, meets in Malaysia with no principled Islamic objection whatever.

On all this, the reformers are completely candid. A leading drafter, Professor Ahmad Ibrahim, describes the drafting process as starting with the secular law and modifying it only where Shariah requires a different rule.<sup>463</sup> (In some cases, notably marital property, the process is better described as lifting of the secular rule verbatim and not modifying it even where Islamic law differs.) Another member of the Technical Committee describes the operative, permissive principle of rule borrowing: "If is not inconsistent [with Islam], we

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462. A. Monir, *supra* n. 327. Similar statements are legion. See, e.g., Abdullah Abu Bakar & Nadzim Abd. Rahman, *The Recent Development in Muslim Family Law: The Malaysian Experience* 30 (unpublished paper presented at the International Shariah Conference on the Recent Developments in Muslim Family Law, Pusat Islam, Kuala Lumpur, Aug. 3-5, 1990) (need "to appreciate that Islam is capable of answering the challenges of time."). Abdullah and Nadzim endorse an eclectic search to insure that Islamic law keeps up; it is necessary, they say, "to dive into the sea and obtain the pearls of intellectual wisdom for [this] purpose." *Id.* On *ijtihad* in general, see Weiss, *supra* n. 23.

463. Ahmad Ibrahim, "The Shariah and Codification—Malaysia Experience," 1987 *Shariah L.J.* 47, 58.

take it as Islamic."<sup>464</sup> A leader of a powerful *dakwah* group agrees. The answers to modern problems are not found in classical sources or in the learning of ulama. Needing improvement, Islamic thought includes that which does not contradict Islam.<sup>465</sup> Such a formulation licenses liberal borrowing.

A close examination of the background arguments for Shariah and its reform in Malaysia reveals their antinomial, even mutually contradictory, quality. On the one side are claims that Islamic law is, contrary to stereotype, a developed system able to meet the challenges of modernity. Indeed, the general Islamic system is explicitly compared to the English system and not found wanting, even occasionally found superior. Hence Ali Baharum, in a study of the contractual capacity of minors, concludes that Islamic law is more flexible and subtle than the English law, which relies on a fixed age of majority.<sup>466</sup> In a book on the law of misrepresentation, he shows that considerable overlap exists between English and Islamic doctrine, but he frequently points to a superior Islamic rule.<sup>467</sup> In the same vein, some writers have suggested that the emerging Anglo-American rules on irretrievable breakdown of marriage have, "perhaps unconsciously, marched in the direction of the Islamic Law of divorce based on the doctrine of *shiqaq* [unbridgeable marital discord]."<sup>468</sup> But if, on this side, a certain defensive chauvinism is in evidence, on the other side is the recognition that Islamic law, though once a great system, languished with the worldwide decline of Islam. It had great moments in and after the time of the Prophet, again in Grenada and in the Ottoman Empire, but now it needs to be redeveloped.<sup>469</sup> The

464. The quotation is drawn from an interview in Kuala Lumpur, April 15, 1992. Cf. Hashim Mehat, *Syariah Sebagai: Satu Sumber Common Law Malaysia: Harapan dan Hakikat* [Syariah as a Source of Malaysian Common Law: Hopes and Reality] 20 (unpublished paper presented at the Seminar on Syariah and Common Law, Kuala Lumpur, Pusat Islam, 16-17 May 1992) (any custom widely and fully practiced, and not inconsistent with Islamic principles, is acceptable; citing—revealingly—*harta sepencarian*, which is difficult to reconcile completely with Islamic law).

465. I am drawing here on a lengthy interview with a national leader of an influential Islamic organization, Bangi, Feb. 28, 1991.

466. Mohd. Ali Hj. Baharum, "Minor Contract Under English and Islamic Law of Contract," 1 *Jurnal Perundangan* 46 (1989).

467. Mohd. Ali Baharum, *Misrepresentation: A Study of English and Islamic Contract Law* (1988).

468. S. Jaffer Hussain, "Marriage Breakdown Under the Law Reform (Marriage and Divorce) Act, 1976, and in Islam: A Comparative View," 1 *Int'l Islamic U. L.J.* 113, 138 (1989). See id. at 115. See also Ahmad Ibrahim, "Islamic Law in Malaysia," *Malays. L. News*, July 1992, at 24, 27.

In Malaysia, however, the sequence was the opposite, as the Islamic statutes converged with the previously-enacted secular statutory provisions on divorce. See *supra* nn. 265-71 and accompanying text.

469. Cf. Abdur Rahman Ibn Abdul Aziz al Qassim, "The Idea of Codifying the Sharia Rules: Its Past, Present and Future," 3 *Contemp. Jurisp. Res. J.* (No. 4) (Riyadh) 21, 25 (Jan.-Mar. 1992) (Islam needs a "developed Islamic jurisprudence. . . . able to respond to the changing needs of contemporary life . . .").

only practicable way to do this is by borrowing. Do these conflicting arguments, taken together, not furnish a warrant for change that is simultaneously Islamic and English? Do they not together predict a hybridized law, drawing heavily on the competitor that is ahead?

English law, in its Malaysian secular incarnation, is, then, the reference model for the reformers. Anyone who doubts the influence of the surrounding legal environment on the reformers should consider that their view of an appropriately structured Islamic legal system for Malaysia is even colored by the secular governmental system in which they find themselves. The secular court system in Malaysia is unitary—there are no state judges—and the presence of state Islamic judiciaries creates a sense of dissonance that reinforces the reformers' desire to centralize the Shariah system and make it uniform. This is one of the most recurrent elements in their discourse,<sup>470</sup> and it points to what they regard as unfinished business: the creation of a single Shariah system in Malaysia.

It is not uncommon for perceived internal deficiencies to give rise to positive attitudes toward external norms.<sup>471</sup> Nor, of course, is legal borrowing more generally uncommon. On the contrary, although the frequency of borrowing varies from time to time and place to place, borrowing is a longstanding method of legal change. As R.H. Helmholz has shown, the common law borrowed defamation actions and bankruptcy statutes from the canon law in the sixteenth century, while at roughly the same time ecclesiastical lawyers were copying forms used in the royal courts.<sup>472</sup> In medieval Europe, linked by the lingua franca of Latin, borrowing across jurisdictions was common. Linguistic separation and ultimately the nationalism of the nineteenth and twentieth centuries seem to have created an exceptional situation in which borrowing was somewhat less common, but the more recent diffusion of legal ideas suggests that this has already changed.<sup>473</sup>

Yet we continue to know little about the conscious and unconscious processes by which borrowing, seepage, and transplantation take place, and much of what we think we know is wrong.<sup>474</sup> In a celebrated article, *On Uses and Misuses of Comparative Law*,<sup>475</sup> Otto

470. See, e.g., A. Monir, *supra* n. 327, at 23-24; Abu Hurairah, *supra* n. 318, at 54; Ahmad Ibrahim, *supra* n. 160, at xix; Cherno S. Jallow, *supra* n. 49, at 99.

471. Merton & Kitt, "Reference Group Theory and Social Mobility," in *Class, Status and Power* 409 (Reinhard Bendix & Seymour Martin Lipset eds. 1953).

472. R. H. Helmholz, *Canon Law and English Common Law* 8-15 (Selden Society Lecture, July 5, 1982; 1983).

473. See nn. 39-43, *supra*, and accompanying text.

474. It is most certainly not true that "[l]egal transplants practically never work." Robert B. Seidman, *The State, Law and Development* 34 (1978). While it may be true that the law imported by Ataturk's Turkey was more effective in the commercial field than in family life, see Yehezkel Dror, "Law and Social Change," 33 *Tulane L. Rev.* 787, 799 (1959), the same is not true without considerable qualification in Malaysia.

475. 37 *Mod. L. Rev.* 1 (1974).

Kahn-Freund suggested that procedural law is hardest to transplant, because national characteristics get in the way, particularly the habits of the bar, conservative as it often is with respect to modes of proceeding.<sup>476</sup> The Malaysian Islamic case might seem to be in direct contradiction, since the secular English models of civil and criminal procedure, of evidence, of trial and appellate structure, and of common law adjudication were, with some modifications, imported across the boundary on a wholesale basis. This suggests a major distinction between external borrowing (across countries) and internal borrowing (within countries). Dual systems within countries would seem to have no special difficulty borrowing procedural institutions across system boundaries, precisely for reasons of familiarity. In fact, everything we know about dual systems suggests the hybridization of their judicial procedures, as well as of their methods of decision and their conceptual apparatus.<sup>477</sup>

Several other characteristics of dual systems are manifest in the Malaysian case, which sheds light on the phenomenon of legal dualism in general. As political power shifts between the segments underlying the dual system, there is often a tendency toward purification, an effort to cleanse excrescences and return to the perceived original version. With the rise of resentment against English law, there was thus an effort to restore the unsullied civil law in Quebec and the Roman-Dutch law in South Africa to their original state and their rightful status.<sup>478</sup> Typically, these efforts fail to pull the systems apart or to revive the legal status quo ante, although they may well alter the relative prestige of the two systems. An equal and opposite tendency is to end the duality itself, either by choosing decisively one system over the other or by fusing the two. For legal positivists and centralists, dualism or pluralism is an "imperfect," anomalous, state of affairs.<sup>479</sup> The Malaysian evidence is strong that in a variety of ways dualism creates discomfort and inconvenience among the participants, who move, when they can, to reduce the dis-

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476. *Id.* at 20.

477. van Blek, "The Genesis of the 'Modernist-Purist' Debate: A Historical Bird's-Eye View," 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 255, 260 (1984); Howes, "From Polyjurality to Monojurality: The Transformation of Quebec Law, 1875-1929," 32 *McGill L.J.* 523, 530-31, 534 (1987); Lemieux, "The Quebec Civil Law System in a Common Law World: The Seven Crises," 34 *Juridical Rev.* 16, 27 (1989); White, "Some Problems of a Hybrid Legal System: A Case Study of St. Lucia," 30 *Int'l & Comp. L.Q.* 862, 870 (1981); Thomas E. Carbonneau, *The Survival of Civil Law in North America* 3-4 (unpublished remarks, mimeographed, no date).

478. See Howes, *supra* n. 477, at 547; van Blek, *supra* n. 477, at 256-60.

479. Griffiths, "What Is Legal Pluralism?," 24 *J. Leg. Pluralism* 1, 8 (1986). Dual legal systems are poorly understood by positivist theories, since in principle the single sovereign could abolish one of the parallel systems at will. See John Chipman Gray, *The Nature and Sources of the Law* 328 (2d ed. 1921). For the unifying tendency in Louisiana's early legal system, see George Dargo, *Jefferson's Louisiana: Politics and The Clash of Legal Traditions* 168 (1975).



sonance between systems. The result is the Malaysian paradox—which may not be atypical—that, even as the systems are pulled apart, restratified, and relegitimized, the dissonance between the rules and institutions of the two is reduced and their content actually converges.

In the process of recovering authenticity through legal change, two impulses that seem at odds must ultimately find reconciliation. The first is the urge to purify, to recapture, to retrieve a sense of loss—in this case, lost law. The second is the urge to reduce the dissonance between legal systems found in the same space, for, like other forms of dissonance, legal dissonance is often experienced as disturbing and unnatural.<sup>480</sup> The reconciliation of these impulses—purification through convergence, so to speak—takes place through the medium of comparison. An authentic law must have the ability to withstand comparative scrutiny—which is to say that the specific content of law deemed authentic may be less important than that it catch up with the competition, even if that means appropriating some of its legal norms. Legal convergence can thus go hand-in-hand with the recovery of legal authenticity.

The means to dissonance reduction is the participation of reformers active in both systems. However much they say they are in one system looking in at the other, in fact, as academics, they often write on both systems, and, as practitioners and drafters, too, they act in both.<sup>481</sup> Accordingly, they find it easy to carry the assumptions of one system straight into the other. The institutions and habits of one system can come to infuse the work of another through a process of legal acculturation.

One function that the convergence of the two systems performs is to assuage, to some extent, the fear among nominally observant, middle-class Malaysian Muslims that there will be a retreat to obscurantism. Among them, there is little respect for ulama, whom they often view as dropouts from the secular school system, and there is little confidence that the Islamic system is up to the demands of the modern world. They often see it as intruding on personal freedom—the freedom to take an occasional alcoholic drink, for example—and they resent the constant drumbeat of support for it.

Such views go further among some Malay members of the bar, whose admiration for British justice goes hand in hand with a certain disdain for their image of a traditional Islamic system. They would mourn the passing of the common law. Since the public expression of

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480. See generally Griffiths, *supra* n. 479; Dargo, *supra* n. 479. See also McKnight, "Some Historical Observations on Mixed Systems of Law," [1977] *Juridical Rev.* 179, 184-86.

481. For example, Professor Ahmad Ibrahim is an authority on the secular family law, as he is on Islamic law; Dr. Monir Yaacob has written a general introduction to the Malaysian legal system, *supra* n. 114.

their position would be understood as unacceptable opposition to Islam, they sometimes express, in muted terms, sarcasm for the conformity enforced by those they see as sanctimonious opponents at the bar and in the intelligentsia, those who embrace Islamic virtue with conspicuous piety and so are able to dominate the surface level of debate. The efforts of the reformers to infuse the new Islamic law with common law concepts and procedures induce a sigh of relief among those who revere English law.

Simultaneously, then, staunch proponents of Islam and detractors of Islamic law are mollified by a course of innovation that is heavy on the convergence of legal systems. There is even talk of a new Malaysian common law, to which English and Islamic practice could make the main contributions.<sup>482</sup>

Now, of course, the content of the two systems does not converge in every way. But elements of divergence between the Malaysian secular and Islamic systems are not attributable to any revival of lapsed law on the Islamic side of the boundary. Long-lapsed law rarely revives. Rather, new Islamic rules are borrowed from other Islamic source systems, alleged to have affinity with the borrowing system. In the Malaysian case, such Islamic source systems are found mainly in Pakistan, India, and Singapore.<sup>483</sup> Although they sometimes speak of reviving "pure" Islamic law, the borrowers are actually looking for desirable rules and institutions that can be imported from live, working systems.

The choice of those systems, however, is significant. The main source countries are also former British colonies, and all of them have been subject to similar transactions across the legal boundary between Islamic sacred and English secular. The geographically and linguistically proximate Islamic systems of Indonesia and the southern Philippines are not altogether unknown,<sup>484</sup> but they are significantly less well known, more foreign in spirit, and less plausible as sources for borrowing. The style of the legislation borrowed and the mode of interpretation utilized in India, Pakistan, and Singapore are infused with a common-law ethos. And so even borrowing from exogenous sources operates to limit the divergence in content. The choice of source countries for borrowing can produce perverse results: what

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482. See A. Monir, *supra* n. 327, at 27.

483. On the law of wills, Egyptian Islamic law is also to be utilized for certain substantive rules, though the procedural framework for probate is to be derived entirely from the common law.

484. See, e.g., the symposium on Islamic law in southeast Asia, [1985] *Syariah L.J.* 1-123; Bustani Arifin, "The Administration of Shariah Laws in Indonesia," [1984] *Syariah L.J.* 15; Mastura, "The Administration of Muslim Personal Laws in a Muslim-Minority Country," [1984] *Syariah L.J.* 25. See also Ahmad Ibrahim, "The Shariah Court and Its Place in the Judicial System," 5 *Syariah L.J.* 1, 8-24 (1989) (discussing Pakistani and Indonesian cases).

looks familiar may turn out to be distant,<sup>485</sup> and what looks distant may turn out to be familiar.

There has been much academic discussion of the phenomenon of legal pluralism (including dualism), albeit in the face of some uncertainty about whether pluralism means the existence of two or more legal systems operating in a single state or merely two contending sets of norms with moral claims operating in a single environment.<sup>486</sup> In many ways, the Malaysian developments confirm and amplify much of the discussion of the interpenetration of parallel sectors, the imitation of one by the other, and the impulse to ultimate unification.<sup>487</sup> The Malaysian changes also suggest the fruitfulness of an insight, inadequately developed in such discussions, regarding the competition between sectors.<sup>488</sup> Depending on the extent to which jurisdiction is overlapping, the courts of two systems in close proximity may actually compete for business by attempting to offer more desirable procedures or rules of decision. This is not unknown where secular and Islamic systems have had overlapping jurisdiction, as for example in the lively competition for divorce cases between secular and Islamic courts in coastal Kenya,<sup>489</sup> and it was not uncommon in England when ecclesiastical and common law courts were entertaining alternative actions.<sup>490</sup> Neglected by utilitarian theorists, this competition can be an engine for change, even for a certain efficiency.

In one respect, however, discussion of legal pluralism has been counterproductive. Law, it is said, "encodes . . . asymmetrical power relations,"<sup>491</sup> and legal pluralism implies the inequality of the systems adjacent to each other.<sup>492</sup> But to insist too strongly on this point—to suggest "that the whole phenomenon is reducible to but another chapter in the history of oppression: who swindles whom, when, where, and how"<sup>493</sup>—is to underestimate the capacity for

485. In South Africa, for example, in the first half of the twentieth century, when Afrikaner jurists sought to purify their Roman-Dutch law of common law excrescences, they turned to the European continent, thinking it natural to refresh their system from European roots; but the post-Napoleonic system may have had less affinity with the pre-code Roman-Dutch system than did the common law they were trying to escape. See Baxter, "Pure Comparative Law and Legal Science in a Mixed Legal System," 16 *Comp. & Int'l L.J. So. Afr.* 84, 95-96 (1983).

486. See, e.g., Bell, "A Perspective on Legal Pluralism in 19th-Century New Brunswick," 37 *U. New Bruns. L.J.* 86, 88 (1988); von Benda-Beckmann, "Comment on Merry," 22 *L. & Soc'y Rev.* 897, 898 (1988).

487. See Griffiths, *supra* n. 479, at 8 (possibility of unification); Merry, "Legal Pluralism," 5 *L. & Soc'y Rev.* 869, 877-81 (1988) (interpenetration and imitation).

488. Merry, *supra* n. 487, at 882.

489. See Susan F. Hirsch, *Gender Differences in Disputing Strategies Among Coastal Kenyan Muslims* 12 (unpublished paper, Chicago, 1987) (women increasingly choosing government courts).

490. Stone, *supra* n. 85, at 24-27.

491. Starr & Collier, *supra* n. 103, at 6.

492. *Id.* at 9; McKnight, *supra* n. 480, at 184.

493. Geertz, *supra* n. 37, at 220.

changing the hierarchy of legal systems and especially to underestimate the paradoxical methods by which such changes are conceived and brought to term. English law has been more prestigious in Malaysia, and it is precisely by burrowing into the system of English law and appropriating its norms for the new Islamic project that the reformers have changed, among other things, the relative prestige of the two systems.

*C. Driving in Two Lanes: Legal Syncretism and Authenticity*

All efforts to recover lost authenticity are inevitably futile, but the direction of the fiction that is indulged along the way varies enormously. In many post-colonial societies, as nationalism broadened out beyond the most acculturated elites, powerful movements arose to recapture local languages, religions, and cultural practices. A conscious rejection of imported forms sent the proponents back, in Albert Memmi's vivid formulation, "to frozen traditions, to a rusted tongue."<sup>494</sup> In this revolt, the person escaping colonization "will forego the use of the colonizer's language, even if all the locks of the country turn with that key; he will change the signs and highway markings, even if he is the first to be inconvenienced."<sup>495</sup> This forcible reconstruction of institutions is one path, but it is, as Memmi notes, merely a phase. In law, especially, the resurrection of precolonial institutions soon proves unsatisfying, for those who simultaneously want economic development, with its complex financial transactions, or improved social conditions, with their concomitant regulation of family life and interpersonal relations. And so, in law, the quest for morally appropriate institutions eventually incorporates at least some of what is imported. All authenticity is fictive, but the content of the fiction—the mix of the elements—is not a given.

Nor is the success of such a legal reform a foregone conclusion. Sometimes the imported law simply cannot acquire a hold on legitimacy. Its legal requirements may be at odds with common patterns of behavior, as imported family law is said to be in Thailand,<sup>496</sup> or they may be so threatening to social relations as to stir active resistance and what amounts to counter-mobilization.<sup>497</sup> Yet it is abundantly clear that the success of a reform is not dependent on its isomorphism with preexisting legal norms or its compatibility with specific features of the culture. The Malaysian reforms, to be sure, avoided some wholesale conflicts with Malay culture by incorporating

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494. Albert Memmi, *The Colonizer and the Colonized* 137 (1965).

495. *Id.*

496. See David M. Engel, *Code and Custom in a Thai Provincial Court* 171-78 (1978).

497. Massell, "Law as an Instrument of Revolutionary Change in a Traditional Milieu: The Case of Soviet Central Asia," 2 *L. & Soc'y Rev.* 179, 201, 205, 217, 222-27 (1967).

elements of adat, such as harta sepencarian (though they transformed it as they incorporated it); but they also challenged what Malays had become accustomed to, in taxation, divorce, payments to rejected wives, and the doctrine of female recalcitrance, among other things. By upgrading the kadis' courts and their procedure, they made it certain that litigants and others who had contact with those courts would be less comfortable with them and would not find them "indigenous." None of this seems to have stirred significant rejection.

It may well be more important that a reform tap a powerful aspiration to modernity or find a home in an unusually adaptable culture, whatever the particular practices of that culture.<sup>498</sup> The receptivity to the reforms among the Malays may reside in their aspiration to be simultaneously Muslim and up-to-date as well as in their history of syncretism. Anyone who has driven on the roads of Malaysia has noticed the extent to which Malaysians do not observe lane discipline but float flexibly on and across lane dividers, and many observers have commented on the highly syncretic character of Malay culture, including a considerable ability to live with contradiction. If Islamic law in Malaysia is a capacious system, far from primal absolutes and far from the stereotype of the Shariah as rigid, fixed, immutable, and medieval, perhaps that is because the Malays have an unusual ability to drive in two lanes, to avoid making decisive choices between two systems. Where tolerance for ambiguity is high, there may be more scope for directed change using eclectic sources of law.

Generally, the ability to live with contradiction is a trait hospitable to legal change. No doubt it can conduce to the adoption of incompatible elements, carelessly pieced together in the legal fabric. But the benefits seem greater. This sort of tolerance permits a legal system to avoid dogmatism and to reject institutions that might otherwise appeal on grounds of mere consistency. It is, in short, conducive to wide-ranging choice of rules and institutions and to pragmatism.

In this flexibility there also lurks a deeper danger. As I have mentioned, there has been discussion in Malaysia of centralizing Islamic law, of synthesizing it with English law to produce a new, overarching Malaysian common law, ultimately removing un-Islamic features from statutes, and then, perhaps, breaking down the barrier between the secular law and the Islamic law altogether. Something like this is the common dream of all who are uncomfortable with dual legal systems. So far it is merely a gleam in the eye of the unifiers.

The implication, however, is that even non-Muslims might be subject to the newly unified law, although they have not participated

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498. This is the argument of Nicholson, "Change Without Conflict: A Case Study of Legal Change in Tanzania," 7 *L. & Soc'y Rev.* 747, 748-49, 760 (1973) (Sukuma were adaptable and appreciative of modern institutions that displaced customary courts).

in the recreation of the Islamic sector.<sup>499</sup> One argument has it that if non-Muslims can accept one foreign system, which they seem to prefer—namely, the English-derived system—why could they not accept a system equally foreign to them but having Islamic features?

Law, remarks Geertz, prospers “if it can compass dissensus . . . .”<sup>500</sup> The test of Islamic law will be its long-term coexistence with some version of the secular system, for the displacement of that system would disconcert non-Malays and religiously less observant Malays as well. For good reason, legal pluralism is likely to endure in many countries.<sup>501</sup> A large, if understandable, error of those who drive in two lanes is to project equivalent adaptability onto others and to assume that what has become, after a lengthy quest, authentic and familiar, however eclectically it was created, can find easy and unequivocal acceptance among people whose own search for authenticity may begin and end elsewhere.

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499. But see Ahmad Ibrahim, *supra* n. 468, at 27-28. Professor Ahmad suggests a much more limited possibility with respect to family law alone: ultimately, a uniform statute for all Malaysians, given the convergence of Islamic and secular norms in this field, but enforced in separate Islamic and secular courts. Presumably, the divorce provisions would rest entirely on irretrievable breakdown, rather than *khul'*, *taklik*, or even *fasakh*. If irretrievable breakdown functioned effectively for men and women, the other grounds would be largely redundant.

500. Geertz, *supra* n. 37, at 219.

501. *Id.* at 220.